

NO. 49271-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON.

Respondent.

v.

JARED HEMINGER.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James Lawler, Judge

BRIEF OF APPELLANT

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Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred in failing to address the essential element of knowledge in its written findings of fact and conclusions of law.¹

Issue Pertaining to Assignment of Error

Where the trial court failed to address the knowledge element of trafficking in stolen property in its written findings of fact and conclusions of law should the case be remanded for further findings?

B. STATEMENT OF THE CASE

The State charged Jared Heminger with first degree trafficking in stolen property (Count I) and second degree theft (Count II). CP 1-3. Heminger entered into a drug court contract. CP 6-11. As part of the contract, Heminger agreed and stipulated that in event of his termination from the treatment program the court could determine his guilt based on the police reports, witness statements and other documentary evidence. CP 7.

The State subsequently petitioned the court to terminate Heminger from drug court. CP 17-18. On May 20, 2016 a hearing was held on the petition. Heminger agreed to the termination and stipulated to proposed written findings of fact and conclusions of law. RP 2-3. Heminger argued

¹ The court's written findings of fact and conclusions of law are attached. CP 22-24.

the stipulated findings did not support the theft charge, and the court agreed. RP 3. That charge was dismissed.

The court, however, adopted and entered the stipulated written findings of fact and concluded Heminger was guilty of the trafficking charge. RP 3; CP 22-24. Heminger was given a standard range sentence of 9 months. CP 27. Heminger timely appealed. CP 34-43.

C. ARGUMENTS

1. THE TRIAL COURT VIOLATED CrR 6.1(d) WHEN IT FAILED TO ADDRESS IN ITS WRITTEN FINDINGS AND CONCLUSIONS THE ESSENTIAL ELEMENT OF KNOWLEDGE.

Heminger was charged and convicted of trafficking in stolen property. The statute provides “[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.” RCW 9A.82.050(1). Traffic is defined by statute. It “means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.” 9A.82.010(19).

Trafficking in stolen property is an alternative means crime. There are two alternative means of committing the offense. State v. Owens, 180 Wn.2d 90, 98, 323 P.3d 1030 (2014). One is to knowingly initiate, organize, plan, finance, direct, manage, or supervise the theft of property for sale to others, and the other is to knowingly traffic in stolen property. Id. (citing State v. Lindsey, 177 Wn. App. 233, 241, 311 P.3d 61 (2013)). Heminger was charged under both alternative means. CP 1-3. Under either means knowledge is an essential element. RCW 9A.82.050(1).

Following a bench trial, the judge must enter written findings of fact and conclusions of law. CrR 6.1(d). Findings and conclusions comprise a record for review on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (citations omitted). In the written findings and conclusions each element of the offense must be addressed separately, setting out the factual basis for each conclusion of law. State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003) (citing State v. Head, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998)). The findings must specifically state that an element has been met. Banks, 149 Wn.2d at 43 (citing State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995)).

It is error if the trial court's findings and conclusions do not support the elements of the crime with a factual basis or state the elements were met. State v. Heffner, 126 Wn. App. 803, 811, 110 P.3d 219 (2005).

Here, the trial court did not specifically address the knowledge element in its findings of fact or conclusions of law. See, Banks, 149 Wn.2d at 48 (the trial court erred in failing address knowledge in its findings of fact and conclusions of law).

Generally, where a trial court enters a conclusion of law finding a defendant guilty of a crime but omits a finding on an essential element necessary to support that conclusion the remedy is remand for findings to adequately state the ultimate facts. State v. Alvarez, 128 Wn.2d at 19; State v. Avila, 102 Wn. App. 882, 897, 10 P.3d 486 (2000), review denied, 143 Wn.2d 1009, 21 P.3d 290 (2001); See, State v. Souza, 60 Wn. App. 534, 805 P.2d 237 (1991) (remand was proper remedy where trial court failed to address the intent element). However, remand is not required if it appears beyond a reasonable doubt that the error did not contribute to the verdict. Banks, 149 Wn.2d at 44 (citations omitted).

The error here was not harmless beyond a reasonable doubt. The court found text messages to John Burkett's phone from a person whose entry into the phone is listed as Heminger depicted pictures of the security equipment the person was attempting to sell to Burkett. CP 22-24 (finding 1.1). Heminger's father, who worked for a security company, told police Heminger must have taken the equipment from his truck. Id. (finding 1.2). There are no facts to indicate who stole the security

equipment, if anyone, and the court correctly concluded the stipulated facts did not support the theft charge. Because the court concluded that the facts do not prove Heminger stole the equipment beyond a reasonable doubt, it is logical to infer that Heminger may not have knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of the property for sale to others, or knowingly trafficked in stolen property. Thus, the court's failure to address the knowledge element in its findings of fact and conclusions of law is not harmless beyond a reasonable doubt and remand is the appropriate remedy.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION
AND DENY ANY REQUEST FOR COSTS.

Heminger was represented below by appointed counsel and was found indigent for purposes of this appeal. RP 5; CP 48-49. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing Heminger did not object to the imposition of mandatory legal financial obligations (DNA fee, VPA, and criminal filing fee) or the court appointed attorney fee. RP 5. However, Heminger informed the court the last time he worked was three years earlier when he

was 18 years old, that he suffers from PTSD and social anxiety that hinder his ability to work, and that he was in the process of applying for SSI disability. RP 6.

Under RCW 10.73.160(1), appellate courts “may require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the State. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, the court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief.” Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94.

Based on Heminger’s indigence, that he has never worked since becoming an adult, and that his disabilities hinder his ability to work, this

Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

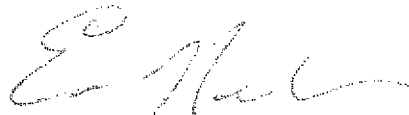
D. CONCLUSION

For the above reasons this Court should remand to the trial court for further findings and conclusions on the knowledge element of the offense. Also, in the event that Heminger does not substantially prevail on appeal, this Court should exercise its discretion and decline to order Heminger to pay the costs of the appeal.

DATED this 26 day of October, 2016.

Respectfully submitted,

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Superior Court

MAY 20 2016

By Kathy A. Brack, Clerk
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SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JARED ALFONS HEMINGER,

Defendant.

NO. 16-1-00040-21

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
BENCH TRIAL

THIS MATTER having come before the above-entitled Court for a Stipulated Facts Bench Trial on May 20, 2016, the Defendant was present and represented by his attorney, Sam Groberg; the State was represented by Jessica L. Blye; the Defendant having stipulated to the admissibility and sufficiency of the following facts and the Court having considered the following facts for the purpose of rendering a verdict of guilty or not guilty beyond a reasonable doubt, the Court makes the following:

FINDINGS OF FACT

1.1 On December 8, 2015, Detective Adam Haggerty arrested John Burkett for drug charges, and obtained a search warrant for his belongings, which included the ability to view text messages on his cell phone. In Burkett's cell phone, Detective Haggerty located a series of text messages between Burkett and Jared

FINDINGS OF FACT AND
CONCLUSIONS OF LAW –

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1 Heminger exchanged on December 7, wherein Heminger was selling Burkett
2 security equipment. These text messages depict pictures of the security
3 equipment from a person whose entry into the phone is listed as "Jared
4 Heminger" with a phone number of 360-970-0082. The value requested by
5 Heminger for the security equipment was approximately \$3500.00
6

7 1.2 On December 14, Detective Haggerty met with Heminger's parents and asked
8 them about the security equipment their son was selling. Heminger's father
9 indicated that he worked for a security installation company and that his son
10 must have taken the items depicted in the text messages from his work truck.

11 1.3 Detective Haggerty learned that Jason Cane was the owner of the security
12 company Heminger's father worked for and that he was the actual owner of the
13 security equipment. Cane was contacted and agreed to cooperate with the
14 prosecution of Heminger for selling his security equipment.
15

16 1.4 Based upon the foregoing Findings of Fact, the Court makes the following:
17

18 CONCLUSIONS OF LAW

19 2.1 The Court has jurisdiction over the Defendant and the present subject matter.

20 2.2 The Defendant, Jared Alfons Heminger, is guilty beyond a reasonable doubt of
21 the crime of Trafficking in Stolen Property in the First Degree, as alleged in the
22 Information.

23 2.3 ~~The Defendant, Jared Alfons Heminger, is guilty beyond a reasonable doubt of~~
24 ~~the crime of Theft in the Second Degree, as alleged in the Information.~~
25
26

FINDINGS OF FACT AND
CONCLUSIONS OF LAW –

ORDER

3.1 Based upon the foregoing Findings of Fact and Conclusions of Law, the Defendant, Jared Alfons Heminger, is guilty beyond a reasonable doubt of the crime of Trafficking in Stolen Property in the First Degree, as alleged in the Information.

3.2 ~~Based upon the foregoing Findings of Fact and Conclusions of Law, the Defendant, Jared Alfons Heminger, is guilty beyond a reasonable doubt of the crime of Theft in the Second Degree, as alleged in the Information.~~

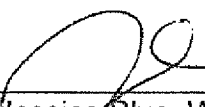
3.3 A judgment and sentence consistent with these findings shall enter.

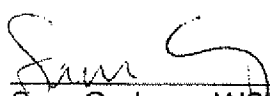
DONE IN OPEN COURT this 20 day of May, 2016.

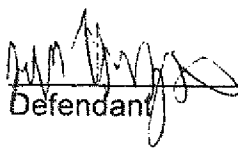

SUPERIOR COURT JUDGE

Presented By:

Approved as to form:


Jessica Blye, WSBA #43759
Deputy Prosecuting Attorney for
Lewis County, Washington


Sam Groberg, WSBA #39540
Attorney for Defendant


Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW –

NIELSEN, BROMAN & KOCH, PLLC

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